

## **EXHIBIT A**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	:	08-CR-00288(SJ)
	:	
	:	
-against-	:	United States Courthouse
	:	Brooklyn, New York
	:	
	:	Monday, November 16, 2009
THOMAS ARCHER	:	9:30 a.m.
and RUKHSANA RAFIQUE,	:	
	:	
Defendant.	:	

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TRANSCRIPT OF CRIMINAL CAUSE FOR PRE-TRIAL CONFERENCE  
BEFORE THE HONORABLE STERLING JOHNSON, JR.  
UNITED STATES SENIOR DISTRICT JUDGE

A P P E A R A N C E S:

For the Government: BENTON J. CAMPBELL, ESQ.  
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BY: ANDREW EDWARD GOLDSMITH, ESQ.  
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For the Defendant: ALOMAR & ASSOCIATES, P.C.  
60-89 Myrtle Avenue  
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Ridgewood, New York 11385  
BY: KARINA E. ALOMAR, ESQ.

Proceedings

7

1           The Government and the defense got the copies at the  
2 same time on Friday afternoon.

3           THE COURT: So, you didn't have copies and they  
4 didn't have copies?

5           MR. GOLDSMITH: That's correct, Your Honor.

6           We are -- we do join in the defense's request to  
7 have jury selection go ahead today, but to have openings begin  
8 on Wednesday, really just to eliminate any issue about whether  
9 they have had sufficient time to look at these copies before  
10 the cross.

11           These copies are relevant to the first witness --  
12 the witness the Government plans to call first.

13           THE COURT: Let me tell you that I am not very happy  
14 with the Department of Homeland Security. I do not like their  
15 conduct in these proceedings.

16           Now, I am going to grant your adjournment, but I am  
17 not going to do it for Thursday because I'm taking into  
18 consideration; Ms. Alomar said that some time ago she had  
19 tickets for wherever she was going on the 25th, and I don't  
20 think that we will be finished by the 25th. So, I'm going to  
21 give you a date later on.

22           The other thing is that I have an issue that I have  
23 to resolve with respect to Mr. Gupta.

24           There was a deposition that was taken and the  
25 allegations are that the Government -- and when I say "the

## Proceedings

8

1 Government," there's only one Government, that's the  
2 U.S. Attorney's Office and, whether Homeland Security knows it  
3 or not, or agree or not, they are part of the Government.

4 They said or allowed Mr. Gupta to depart the country  
5 back to -- where did he go to; to India?

6 MR. GOLDSMITH: Yes, Your Honor.

7 THE COURT: Now, as you point out in your papers,  
8 and, also, Ms. Whalen points out in her papers, that:

9 "A witness is not unavailable if his absence is due  
10 to the procurement or wrongdoing of the proponent of the  
11 deposition testimony for the purpose of preventing the witness  
12 from attending or testifying."

13 I am very suspicious of the actions of the  
14 Department of Homeland Security and I'm going to order a  
15 hearing. And I want the officials at Homeland Security who  
16 are responsible for allowing Mr. Gupta to leave.

17 I, also, am concerned and very suspicious; in the  
18 papers of Ms. Alomar, and I don't think they have been  
19 disputed, that there was a -- that Gupta's C-visa and H-4-visa  
20 application have been destroyed. How have they been  
21 destroyed?

22 I mean, why were they destroyed?

23 MR. GOLDSMITH: Your Honor, the -- Mr. Gupta's files  
24 with Immigration did not include any C-visa or the  
25 other visa -- either of these two visas or visa applications

## Proceedings

9

1 that they requested. There weren't, they just weren't in the  
2 files.

3 Ms. Alomar suggested that we check Mr. Gupta's  
4 wife's file because maybe they were in there for some reason.

5 We did try to obtain her file. It turned out that  
6 those files had been destroyed in 2007 and 2008. The wife's  
7 files.

8 My understanding is that the reason is, that there  
9 are various kinds of files. The wife's files were what are  
10 called receipt files. They are created when certain types of  
11 applications are made.

12 Those files, after a certain amount of time goes by,  
13 those files are destroyed, unless --

14 THE COURT: When is the period of time? How long do  
15 they keep them?

16 MR. GOLDSMITH: I don't know that, Your Honor.

17 My understanding is that it's the ordinary course;  
18 that these were destroyed in the ordinary course, whatever  
19 that is.

20 THE COURT: Fine. I want somebody from Homeland  
21 Security to testify as to the policy.

22 There is, also, a law that says that Government  
23 files are to be kept for a certain period of time.

24 Do these files fall within that particular  
25 parameter? I don't know. But I want somebody from Homeland

Proceedings

10

1 Security to be here to be able to testify, under oath.

2 MR. GOLDSMITH: Yes, Your Honor.

3 I should add, it's not entirely clear that the  
4 applications on behalf of Mr. Gupta that defense counsel is  
5 looking for were ever even in these files of his wife's.

6 THE COURT: It may be, but I don't know that. I  
7 will have to make that determination.

8 The other thing is, that they're putting you in an  
9 uncomfortable position; I see that you had promised, according  
10 to Ms. Whalen, to provide the defense a certain file and that  
11 Ms. Whalen alleges in her letter, dated November the 9th, that  
12 Homeland Security refused to allow you to give the files to  
13 her, or to present them for this.

14 Homeland Security has no authority to refuse to do  
15 anything. Homeland Security, part of the Government, will do  
16 what I tell them to do. But we will have this hearing.

17 Is Thursday good?

18 MS. WHALEN: This Thursday?

19 THE COURT: Yes.

20 MS. WHALEN: Yes, Your Honor.

21 MS. ALOMAR: That's fine, Your Honor.

22 MR. GOLDSMITH: That's fine, Your Honor.

23 THE COURT: This Thursday.

24 And you will have people here from Homeland Security  
25 who will testify under oath.

Proceedings

12

1 MR. GOLDSMITH: I did not mean to suggest he was,  
2 Your Honor.

3 Well, I understand, thank you.

4 THE COURT: I don't know whether he is or not, but I  
5 want somebody here to testify as to the circumstances  
6 surrounding Mr. Gupta being allowed to leave the country. And  
7 they will testify under oath.

8 MR. GOLDSMITH: Yes, Your Honor.

9 THE COURT: Okay? This will be this Thursday.

10 Now, what we'll do is to -- we'll have a control  
11 date.

12 Ana, let's get a control date.

13 I probably won't be able to try this case until  
14 after the first of the year because I have a busy trial  
15 schedule. And I will be trying cases in other jurisdictions,  
16 also.

17 But let's have a control date, Ana.

18 THE COURTROOM DEPUTY: Sometime in January?

19 THE COURT: Get a date.

20 THE COURTROOM DEPUTY: Yes, Your Honor.

21 January 4th, at 9:30.

22 THE COURT: Now, you might have a good case, you  
23 might have a strong case, but you are being undermined by the  
24 Department of Homeland Security.

25 I said that on the record, not you.

Proceedings

13

1 MR. GOLDSMITH: Thank you, Your Honor.

2 THE COURT: And then, what you'll do is, that if you  
3 need something from the Homeland Security, whatever it is, you  
4 tell them this is what you want.

5 And if they don't comply with your direction, you  
6 tell me.

7 I will either tell them or the case might be  
8 dismissed. I don't know. Okay?

9 MR. GOLDSMITH: Yes, Your Honor.

10 There's one other pending motion, which is  
11 Mr. Archer's renewed motion to exclude testimony of  
12 Mel Shatzkamer. It was filed on Friday.

13 We filed a response, I believe, yesterday.

14 THE COURT: From who? I haven't seen it yet.

15 MS. ALOMAR: Your Honor, I filed the motion.

16 THE COURT: I was out of town and I just got back  
17 2:00 o'clock Saturday morning. Now, I was here Saturday  
18 afternoon, but I did not see it.

19 Now, what is your motion?

20 MS. ALOMAR: Your Honor, the essence of my motion is  
21 that Your Honor gave me permission to renew my opposition to  
22 Officer Shatzkamer's testimony.

23 And my, the basis for my opposition is --

24 THE COURT: Who is Shatzkamer?

25 MS. ALOMAR: Shatzkamer is an officer from The



## Proceedings

14

1 Department of Homeland Security who is -- the Government is  
2 saying that they're not going to qualify him as an expert, yet  
3 he's going to come in and testify as to patterns of fraud.

4 It is the defense's position that to permit this  
5 officer to testify as to patterns without giving any type of  
6 empirical data upon which this data can be relied upon is  
7 wrong.

8 In addition, it is our position that if  
9 Officer Shatzkamer is going to -- if he's going to testify in  
10 the same manner that he did in a trial in the Southern  
11 District, entitled U.S. v. Gupta, that he's misleading the  
12 jury because he's going to be testifying --

13 THE COURT: Let me hear from the Government.

14 MR. GOLDSMITH: Your Honor, the Government has said  
15 repeatedly, in papers and in court, which are cited in our  
16 response to Mr. Archer's motion, that Officer Shatzkamer will  
17 not be testifying as to his opinion to anything, including as  
18 to whether the facts in the files that he reviewed suggest  
19 fraud.

20 He will be testifying, essentially, as a summary --  
21 as a speaking summary chart. He reviewed the applications  
22 prepared by the defendants and he can -- there are 175  
23 applications and he can say that some number of those  
24 applications had X characteristics, some number of them had Y  
25 characteristics. It's a factual matter.